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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1941

NATIONAL MANUFACTURE AND  
STORES CORPORATION,

*Petitioner,*

v.

MARION H. ALLEN, COLLECTOR  
OF INTERNAL REVENUE,

*Respondent.*

No. **1091**

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

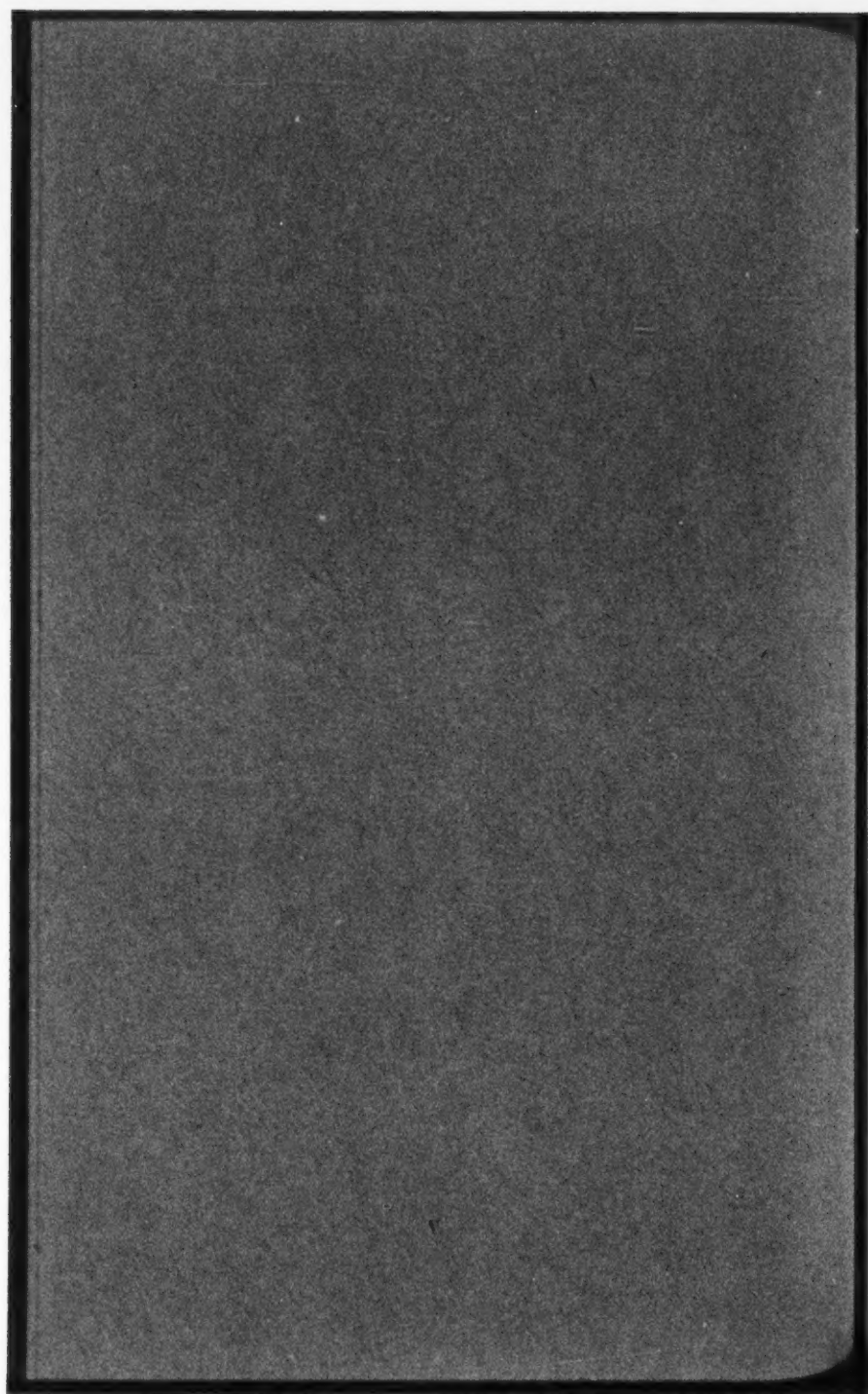
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MARION H. ALLEN, COLLECTOR  
OF INTERNAL REVENUE,  
*Respondent.*

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No. ....

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Fifth Circuit, and for reason therefor respectfully shows the following:

**JUDGMENT AND OPINION BELOW**

The judgment sought to be reviewed was entered January 28, 1942, by the Circuit Court of Appeals for the Fifth Circuit in the case of Marion H. Allen, Collector of Internal Revenue v. the case of Marion H. Allen, Collector of Internal Revenue v. National Manufacture and Stores Corporation. (R. 47) The opinion of the Circuit Court of Appeals commences on page 39 of the Record, and the dissenting opinion on page 44.

The judgment of the Circuit Court of Appeals reversed a judgment of the District Court of the United States for the Middle District of Georgia in favor of the petitioner, taxpayer. (R. 31) The findings of the District Court commence on page 27 of the Record and the opinion of the District Court on page 32.

## STATUTE AND REGULATION INVOLVED

The Revenue Act of 1936 is involved and the controversy turns upon the construction of Section 22(a), as follows:

“(a) GENERAL DEFINITION—‘Gross income’ includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \*”

The Treasury Regulation involved is Treasury Decision 4430, dated May 2, 1934, as follows:

“Acquisition or disposition by a corporation of its own capital stock.—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

“But, if a corporation deals in its own shares as it

might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of the Act."

### **QUESTION PRESENTED**

Under Section 22(a) of the Revenue Act of 1936, with respect to shares of its own capital stock purchased for retirement, did petitioner realize taxable income upon a sale by it of such shares for an amount in excess of the price paid by it for such shares?

It is petitioner's contention: (1) That it realized no income by virtue of such transaction, and; (2) that even if income were realized, such income was not taxable under the Revenue Act of 1936, Section 22(a).

### **REASONS RELIED ON FOR ALLOWANCE OF WRIT**

The question presented is of great importance since it involves the administration of the Revenue laws of the United States in respect of transactions occurring repeatedly and frequently throughout the United States.

A direct conflict exists between the Fifth Circuit Court of Appeals in its opinion in this case, and the Second Circuit Court of Appeals in the case of *E. R. Squibb & Sons v. Commissioner of Internal Revenue*, 98 Fed. (2d) 69. Both cases involve the question whether or not the excess over the cost

price received by a corporation in the sale of its own shares of stock is taxable income. The Second Circuit in the Squibb case holds that there is no taxable income where the shares are sold at a price in excess of their cost but not in excess of their value at the time of sale. The Fifth Circuit in its opinion in the present case holds that taxable income is received upon a sale of shares in excess of the cost thereof.

The Supreme Court in *Helvering v. Reynolds Company*, 306 U. S. 110, dealing with the definition of "gross income" in the Revenue Act of 1928, held that by virtue of successive reenactments of the Revenue laws between 1913 to and including 1932 with no change in the provision of the law, that Congress was deemed to have adopted the construction given to the statute by the Treasury Regulations during these fifteen years.

Thus, the Court held that under the Revenue Act of 1932 a corporation derived no gain or loss upon the purchase and sale by it of its own stock. This was in accordance with the interpretation of the statute by the Treasury Regulations which this Court said had through many successive reenactments of the statute become imbedded in the statute itself.

No change in the definition of "gross income" was made in the enactment of the Revenue Act of 1934, Sec. 22(a).

The Section (22(a)) was reenacted exactly in the same language in the Revenue Act of 1936.

However, the Treasury Department on May 2, 1934, just two days before the enactment of the Revenue Act of 1934, by Treasury Decision 4430 changed the regulations with respect to purchase and sales by a corporation of shares of its own stock. This Treasury decision is hereinabove quoted in full.

It is petitioner's position that the law in respect of such transactions could not be changed by Treasury Regulations, and that

if T. D. 4430 be construed to change the law, that the said T. D. 4430 is invalid.

The said Treasury Decision 4430 was either called to the attention of Congress or it was not. If it was not called to the attention of Congress it had no effect upon the intention of Congress. If it was called to the attention of Congress then Congress by reenacting the statute in the same language with knowledge that its meaning had been administratively settled and judicially settled by the decision in *Helvering v. Reynolds Company, supra*, instead of adopting the construction shown by the new Regulation, in effect repudiated it and adhered to the former Regulation which had come to have the force of law.

If the Treasury Department can merely by changing Regulations effect a change in the substantive law with respect to a statute which has been construed by the Supreme Court as having a definite meaning, and can make this change without any change in the statute itself and without any action on the part of Congress, then the power of Congress to legislate is relegated to a veto power only.

It is most important to the Treasury Department and to taxpayers alike that the power asserted by the Treasury Department to so legislate be judicially settled and determined.

### STATEMENT OF CASE

There is no dispute as to the facts. (R. 40)

Petitioner is engaged in the business of selling merchandise on the installment plan.

In 1929 petitioner adopted the policy of buying in its stock for the purpose of retiring it whenever its stock could be acquired at less than its market value. (R. 18, 28)

Pursuant to this policy, over a period of time it bought

11,553 shares of its stock, which it cancelled and retired. (R. 19)

In 1930 and 1931 it bought an additional 6900 shares of its stock with the purpose and intention of cancelling and retiring it. (R. 17, 19, 28) However, with the coming of the depression, petitioner did not have enough available cash to pay for the 6900 shares. (R. 18, 29) Under these circumstances, it made an agreement with Hayden, Stone & Company, brokers, under which the brokers accepted 50% of the purchase price and carried the stock for the balance of the purchase price. (R. 18, 24, 29) The stock was carried on petitioner's books as treasury stock at a nominal figure of \$1. (R. 18, 29)

Finally, as a result of petitioner's needs for cash for working capital, and of a demand by Hayden, Stone & Company for payment, petitioner sold the 6900 shares of stock on March 15, 1937, at \$10 a share, the total amount received being in excess of the cost by \$24,875.65. (R. 19, 24, 28, 29) This was the only treasury stock which the company ever sold. (R. 19) The amount received was, however, less than the intrinsic value or market value of the stock at that time. (R. 22, 30)

Income tax was paid by the petitioner on this excess, after which a claim for refund was filed, and receiving no action on the claim, this suit was filed. (R. 28)

### **CERTIFICATION OF ERRORS**

The Circuit Court of Appeals erred in ruling:

- (1) That petitioner derived income on the sale of its own shares of stock;
- (2) That under Section 22(a) of the Revenue Act of 1936 petitioner was taxable on such income;
- (3) That the amendment of May 2, 1934, to the Treasury Regulations by T. D. 4430 was effective, upon

enactment of the Revenue Acts of 1934 and 1936, to change the law as annunciated by the Supreme Court in *Helvering v. Reynolds*, 306 U. S. 110, without any change in the statute itself.

(4) That petitioner dealt in its own shares as it might have dealt in shares of another corporation.

### CONCLUSION

For the reasons stated, and to resolve the conflict in the opinions of the Second and Fifth Circuits, it is respectfully urged that the writ of certiorari be granted.

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## **BRIEF IN SUPPORT OF PETITION FOR CERTIORARI**

### **JURISDICTION**

The jurisdiction of the Court is based on Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Title 28 USCA Section 347).

### **HISTORY OF REGULATIONS AND STATUTES DEALING WITH SALES BY CORPORA- TIONS OF OWN STOCK**

From 1920 to May 2, 1934, the successive Regulations of the Treasury Department contained the following with respect to transactions by a corporation in its own stock:

**"SALE BY CORPORATION OF ITS CAPITAL STOCK**  
—\* \* \* or if the corporation purchases any of its stock and holds it as treasury stock, the sale of such stock will be considered a capital transaction and the proceeds of such sale will be treated as capital and will not constitute income of the corporation. A CORPORATION REALIZES NO GAIN OR LOSS FROM THE PURCHASE OR SALE OF ITS OWN STOCK."

(Emphasis ours)

*Art. 543 of Regulations 45, 62, 65, 69;*

*Art. 66 of Regulations 74, 77.*

During this time there were five successive reenactments of the income tax laws with no change in the definition of "gross income."

Thus this Court in *Helvering v. R. J. Reynolds Tobacco Company*, *supra*, held that the continued and successive reenactments by Congress of the income tax statute was effective to adopt the departmental interpretation on this subject as shown

by the above Regulations, and that, consequently, the sale by a company of treasury stock at an excess over the cost to it of the stock was not taxable income as to a transaction in 1928.

On May 2, 1934, the Treasury Department by T. D. 4430, set out in full in the foregoing petition for certiorari, amended its Regulations. The Revenue Act of 1934 was enacted into law two days after the promulgation of Treasury Decision 4430. In 1936 the Revenue Act of 1936 was adopted. In both the Revenue Act of 1934 and the Revenue Act of 1936 no change was made in the definition of "gross income."

Throughout the Revenue Acts from the year 1921 through 1936 the definition of "gross income" in so far as here pertinent has remained unchanged. It is as follows:

"(a) GENERAL DEFINITION—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.  
\* \* \*" (Sec. 22(a) Rev. Act 1936)

### CONFLICT BETWEEN CIRCUITS

The decision of the Fifth Circuit in the present case is in direct conflict with the decision of the Second Circuit in the case of *E. R. Squibb & Sons v. Helvering*, 98 Fed. (2d) 69, in which the Court held that a corporation does not derive taxable income from the sale of its own shares previously acquired as treasury stock where the sale is in excess of the cost of the stock, but not in excess of the value of the stock. To the same effect is *Johnson v. Commissioner*, 56 Fed. (2d) 58, decided by the

Fifth Circuit, and *National Home Owners Service Corporation v. Commissioner*, 39 BTA 753, decided under the Revenue Act of 1934. Indeed, the effect of the decision in the present case is to create a conflict within the Fifth Circuit itself, in view of the *Johnson* decision, *supra*.

Petitioner's counsel are advised that there are a number of appeals pending before the United States Board of Tax Appeals involving the same question here involved.

**Securities and Exchange Commission, Accounting Profession and New York Stock Exchange Experts Agree No Gain Derived by Corporation on Sale of Its Own Treasury Stock.**

The Securities and Exchange Commission has ruled on this precise question as follows:

"\* \* \* from an accounting standpoint, there appears to be no significant difference in the final effect upon the company between (1) the reacquisition and resale of a company's own common stock and (2) the reacquisition and retirement of such stock together with the subsequent issuance of stock of the same class."

"It is recognized that when capital stock is reacquired and retired any surplus arising therefrom is capital and should be accounted for as such and that the full proceeds of any subsequent issue should also be treated as capital. Transactions of this nature do not result in corporate profits or in earned surplus. There would seem to be no logical reason why surplus arising from the reacquisition of the company's stock, and its subsequent resale should not also be treated as capital."

*S. E. C. Accounting Series, Release No. 6.*

A Special Committee of the American Institute of Accountants on Cooperation with Stock Exchanges, has reached the same position:

"Your committee believes that while the net asset value of the shares of common stock outstanding in the hands of the public may be increased or decreased by such purchase and retirement, such transactions relate to the capital of the corporation and do not give rise to corporate profits and losses. Your committee can see no essential difference between (a) the purchase and retirement of a corporation's own common stock and the subsequent issue of common shares, and (b) the purchase and resale of its own common stock."

65 *Journal of Accountancy*, 1938, p. 417.

The Executive Committee of the American Accounting Association has reached the same result.

"The income account of a corporation should not include credits or charges resulting from profits or losses on transactions involving the issuance, purchase, or retirement of its own stock. \* \* \* Paid-in capital consists of amounts received for shares issued: capital stock, paid-in surplus, gains from the sale of reacquired shares and from the retirement of re-acquired shares purchased at a discount. \* \* \* Earned surplus should include no credits from transactions in the company's own stock. \* \* \*"

11 *Accounting Review*, 1936, p. 187.

Thus there is absolutely no difference from a factual standpoint in the following two cases:

*Case 1.* Corporation A purchases for \$100 per share 100 shares of its stock for retirement and retires it. It then issues 100 new shares of stock which it sells for \$150 per share. The Treasury Department recognizes that there is no gain or loss on this transaction.

*Case 2.* Corporation A purchases for \$100 per share 100 shares of its stock for retirement, but instead of retiring the stock it sells the stock for \$150 a share.

There is absolutely no difference in effect in the second illus-

tration from the first. The corporation ends up with exactly the same number of shares outstanding, exactly the same capital liability, exactly the same cash position and all stockholders have exactly the same position and interest as in the first case, yet the Treasury Department contends that the second transaction is taxable and the first is not.

Surely the Court must look through form and give effect to substance. *Minnesota Tea Co. v. Helvering*, 302 U. S. 609.

### **TREASURY STOCK IS NOT OUTSTANDING**

The Second Circuit in *Borg v. International Silver Company*, 11 Fed. (2d) 147, concludes that —

“Treasury stock is not ‘outstanding’; such stock not being effective obligation against corporation.”

#### **1934 Amendment to Treasury Regulation T. D. 4430 Not Intended to Affect Type Transaction Here Involved or Change Rule of Law Existing Under Prior Regulations.**

If possible Treasury Decision 4430 should be construed as to uphold its validity.

That the amended Regulation (T. D. 4430) was aimed at ordinary commercial transactions and not at a capital transaction as here involved was the view of the Fifth Circuit in the case of *Dorsey v. Commissioner*, 76 Fed. (2d) 339. That decision written by Judge Sibley some time after the amendment to the Regulations clearly indicates the view of this Court on this subject. It was there stated:

“The point of law dealt with by the Board is whether the transaction was controlled by the last sentence of Regulation 74, Art. 66: ‘A corporation realizes no gain or loss from the purchase or sale of its own stock.’ A reading of the whole Regulation, which had existed at least since

1918, shows that it referred mainly to the original sale of the capital stock and to stock turned back by stockholders to be resold to raise more capital. It was amended in 1934 by T. D. 4430 to distinguish clearly between original capital transactions and ordinary commercial dealings in its own stock as in that of another corporation. \* \* \*

Indeed, the above decision of the Fifth Circuit creates even more confusion in this Circuit.

The type of transactions embraced within T. D. 4430 are dealt with in the following cases:

*G.C.M.* p. 107,

*Cumulative Bulletin Treas. Dept.* X3-1.

*S. A. Woods Machine Co. v. Commissioner*, 57 Fed. (2d) 635.

*Boca Ceiga Development Co. v. Commissioner*, 66 Fed. (2d) 1004.

*Walville Lumber Co. v. Commissioner*, 35 Fed. (2d) 445.

*Spear & Co. v. Heiner*, 54 Fed. (2d) 134.

**1934 Amendment by T. D. 4430 Invalid in so far as It Purports to Change Law.**

In *E. R. Squibb & Sons v. Helvering*, *supra*, the Court accepted this exact view, stating as follows:

"But in any event it seems to us that the uniform interpretation, so long placed upon paragraph 22(a), 26 U. S. C. A. paragraph 22(a), by the regulation and confirmed by the inaction of Congress, was imbedded in the statute so deep that only legislation could dislodge it."

That the Treasury Department has no power to make or change laws, by Regulation or otherwise, is well settled.

*Morrill, Collector v. Jones*, 106 U. S. 466.

*Waite v. Macy*, 246 U. S. 606.

*Miller v. U. S.*, 294 U. S. 435.

“While administrative regulations may interpret and fill in details of an internal revenue statute, such regulations may not amend the statute or alter the meaning which Congress intended that the statute should have.”

*Commissioner of Internal Revenue v. Warren Webster Trust No. 1 et al.*, (Third Circuit) 122 Fed. (2d) 915 (Headnote 5).

**If the Amended Regulation Was Effective to Change the Law the Change Is Not Applicable to the Transaction Here Involved Because Petitioner Was Not Dealing in Its Own Shares in a Speculative Manner or As It Might Have Dealt in the Shares of Another Corporation.**

From the undisputed evidence in this case it is perfectly obvious that petitioner was not speculating in its own stock and was not trading in its own stock as it might have traded in other stocks. The transaction involving the purchase of this stock was undertaken with the specific intention of retiring the stock. When the stock was later sold, it was done for the purpose of raising capital. Therefore, even if the Court should reach the conclusion that the law with respect to a corporation's buying and selling its own stock was changed by T. D. 4430, it is perfectly clear that the transaction involving petitioner does not come within the scope of the change in the Regulation.

Respectfully submitted,

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PETITIONER

v.

MARION H. ALLEN, COLLECTOR OF INTERNAL  
REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT*

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## **BRIEF FOR THE RESPONDENT IN OPPOSITION**

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### **OPINIONS BELOW**

The District Court of the United States for the Middle District of Georgia wrote no opinion; its findings of fact and conclusions of law appear in the record at pages 27-31. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 38-44) is reported at 125 F. (2d) 239.

### **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered January 28, 1942 (R. 44). The peti-

tion for a writ of certiorari was filed March 31, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Where a corporation buys on margin shares of its own stock in 1930 and 1931 and sells them in 1937, is the resulting gain taxable as gross income to the corporation under Section 22 (a) of the Revenue Act of 1936 and Article 22 (a)-16 of Treasury Regulations 94?

#### STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1936 and Treasury Regulations 94 are set forth in the Appendix, *infra*, pp. 9-10.

#### STATEMENT

The facts are not in dispute and may be stated as follows:

Petitioner, a Delaware corporation, reported its income for the year ending June 30, 1937, and paid the tax thereon amounting to \$8,747.96. Thereafter, on October 2, 1939, it filed a claim for refund on the ground that it had erroneously included in its reported income the sum of \$24,875.65, which represented the net amount it had received for the sale in March 1937 of 6,900 shares of its own treasury stock in excess of the amount it had paid for the stock. The claim for

refund not having been acted upon by the Commissioner of Internal Revenue within six months, petitioner instituted the present suit to recover from the respondent Collector (R. 27-28). Recovery was granted by the District Court (R. 31-32). The judgment was reversed by the Circuit Court of Appeals, one judge dissenting (R. 44).

The 6,900 shares of stock sold by petitioner had been bought by it on the open market in 1930 and 1931 pursuant to a policy of reducing its outstanding common stock by purchasing it for retirement at such times as the price was considered advantageous. Petitioner had purchased the shares here involved through Hayden-Stone Company, a brokerage house. The total purchase price was \$43,842.50, including commissions, but because at the time petitioner could not reduce its cash working capital, it did not pay Hayden-Stone the full amount. Hayden-Stone agreed to carry the indebtedness until the company was able to pay it. Meanwhile Hayden-Stone retained possession of the stock. For this reason, the stock, unlike other shares bought by petitioner, was never cancelled and retired on the books of the company, but was carried as treasury stock (R. 28-29).

Between 1931 and 1937 the financial condition of the company became worse and in the latter year petitioner decided to sell common stock in

order to obtain working funds. On March 15, 1937, it sold all the shares here involved to a syndicate of brokers for the net amount of \$68,718.15. The sale price was below the fair value and market price of the stock, but \$24,875.65 in excess of the net purchase price (R. 28-30).

#### ARGUMENT

The decision of the court below that petitioner realized gain "as if it had purchased the stock of any other corporation on margin on a low market and sold it later at a profit on a higher market" (R. 42) is in accord with applicable Treasury regulations which had been promulgated prior to the tax year involved. The decision is correct and not in conflict with any other decision. Although the question is one which may well be litigated in other cases in the lower courts, there would appear to be no basis for certiorari here.

Article 22 (a)-16 of Treasury Regulations 94 (Appendix, *infra*, p. 10) promulgated under the Revenue Act of 1936 provides that—

\* \* \* if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. \* \* \*

The same provision was contained in Article 22 (a)-16 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, and is contained

in the regulations promulgated under the Revenue Act of 1938 (Article 22 (a)-16 of Treasury Regulations 101) and under the Internal Revenue Code (Section 19.22 (a)-16 of Treasury Regulations 103).

Substantially similar language was contained in Treasury Decision 4430, XIII-1 Cum. Bull. 36, which was adopted May 2, 1934, shortly before the enactment of the Revenue Act of 1934. This decision amended prior regulations which, since 1920, had provided that a corporation's purchase of its own stock was a capital transaction from which the corporation could realize neither gain nor loss.<sup>1</sup> The new interpretation was in accord with the regulations which had been in force under the Revenue Act of 1916 as amended in 1917 (Article 98 of Treasury Regulations 33 (revised 1918)), and with the opinions in *Commissioner v. S. A. Woods Mach. Co.*, 57 F. (2d) 635 (C. C. A. 1), certiorari denied, 287 U. S. 613, and other cases.<sup>2</sup>

In *Helvering v. Reynolds Co.*, 306 U. S. 110, this Court held that, in view of the repeated

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<sup>1</sup> Treasury Regulations 45 (Revenue Act of 1918), Articles 542 and 563; Treasury Regulations 62 (Revenue Act of 1921), 65 (Revenue Act of 1924), and 69 (Revenue Act of 1926), Articles 543 and 563; Treasury Regulations 74 (Revenue Act of 1928) and 77 (Revenue Act of 1932), Articles 66 and 176.

<sup>2</sup> *Walville Lumber Co. v. Commissioner*, 35 F. (2d) 445 (C. C. A. 9); *Spear & Co. v. Heiner*, 54 F. (2d) 134 (W. D. Pa.), affirmed, 61 F. (2d) 1030 (C. C. A. 3); *Commissioner v. Boca Ceiga Development Co.*, 66 F. (2d) 1004 (C. C. A. 3).

reenactment since 1920 of the statutory definition of gross income contained in Section 22 (a), the Treasury decision could not be applied retroactively to a transaction occurring in 1929. In so doing, however, the Court agreed with the Government that Section 22 (a) is "so general in its terms as to render an interpretative regulation appropriate" (p. 114). Moreover, while the Court did not decide the question whether the new interpretation could be applied prospectively, it stated that "It may be that by the passage of the Revenue Act of 1936 the Treasury was authorized thereafter to apply the regulation in its amended form" (p. 117).

Thus, there seems little basis for petitioner's contention (Pet. 4, 13-14) that the successive reenactments of Section 22 (a) without change during the period from 1920 to 1934 so far adopted the then existing regulations as to preclude the Treasury from later altering them for prospective application.<sup>3</sup> See *Helvering v. Wilshire Oil Co.*,

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<sup>3</sup> The dissenting judge in the instant case agreed that Article 22 (a)-16 is a valid regulation, but thought it inapplicable for the reason that petitioner had not dealt in its stock within the intendment of the words "deals" and "dealing" appearing in the regulation (R. 40-41). However, where as here a corporation sells its treasury stock as it would its other property, the regulation and statute apply whether or not the corporation had bought in its stock for speculative purposes or was engaged in a course of other such dealings. Cf. G. C. M. 12955, XIII-1, Cum. Bull. 107 (1934); G. C. M. 16651, XV-2 Cum. Bull. 130 (1936); and authorities cited *infra*, footnote 5.

308 U. S. 90; *Helvering v. Reynolds*, 313 U. S. 428. The expression of a contrary view in *E. R. Squibb & Sons v. Helvering*, 98 F. (2d) 69, 70, modified, 102 F. (2d) 681 (C. C. A. 2), which involved an attempted retrospective application of the changed regulations, is inconsistent with the subsequent decisions of this Court just cited. See also *Morrissey v. Commissioner*, 296 U. S. 344, 355.

Petitioners assert (Pet. 3-4, 9) that the instant decision conflicts with the decision in the *Squibb* case in that the Circuit Court of Appeals for the Second Circuit there held that a corporation does not derive taxable income from the sale of its own treasury stock if the sale price, although higher than the purchase price paid by the corporation, is less than the value of the stock at the time of the sale. The opinion in the *Squibb* case contains *dicta* to that effect (98 F. (2d) 70-71), but the point cannot be considered as having been decided since there was no evidence as to the value of the stock and since the Government's contention that the new regulation could be applied retroactively to the sale in question was overruled solely on the ground that "only legislation could dislodge" the interpretation embodied in the displaced regulation.<sup>4</sup> See 102 F. (2d) 681, 682. In any event,

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<sup>4</sup> The decision of the court below in *Johnson v. Commissioner*, 56 F. (2d) 58, cited by petitioners as being in conflict with the instant decision involved, and was based on, the old regulations.

the decision of the court below accords with the view of other courts and authorities.<sup>5</sup>

#### CONCLUSION

It is respectfully submitted that for the reasons stated the petition should be denied.

Respectfully submitted.

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APRIL 1942.

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<sup>5</sup> *First Chhold Corp. v. Commissioner*, 97 F. (2d) 22 (C. C. A. 3), reversed on another ground, 306 U. S. 117; *Investment Corp. of Phila. v. United States* (E. D. Pa.), decided December 17, 1941 (not officially reported but found in 1942 C. C. H., Vol. 4, par. 9206). Comment, *Taxability of Transactions by A Corporation On Its Own Stock* (1937), 47 Yale L. J. 111. See also *R. J. Reynolds Tobacco Co. v. Commissioner*, 97 F. (2d) 302, 306-308 (C. C. A. 4), affirmed, 306 U. S. 110.



## APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

### SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \*

### SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. \* \* \*

SEC. 113. ADJUSTED BASIS FOR DETERMINING  
GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—  
The basis of property shall be the cost of  
such property; except that— \* \* \*

Treasury Regulations 94, promulgated under the  
Revenue Act of 1936:

ART. 22 (a)-16. *Acquisition or disposition by a corporation of its own capital stock.*—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

But if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of the Act.

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